the case of local stations, operators will not even know with whom they need to negotiate such agreements until the must-carry/retransmission consent election is made. For these reasons, Time Warner urges the Commission to require compliance with the must-carry and retransmission consent rules at the same time, on October 6, 1993.

Workable implementation procedures must take into account the fact that decisions as to the composition of the basic tier, channel positioning, the need for additional equipment, the preparation of subscriber education and marketing materials, franchise notice requirements for channel changes and even the preparation of programming guides cannot even be contemplated until after the must-carry/retransmission deadline has passed. Because the October 6, 1993 deadline for retransmission consent contained in the 1992 Cable Act does not appear to allow for extensions or waivers, the Commission must determine how long it will take cable operators to implement changes to their channel lineups once the actual changes are known and then work backward from October 6, 1993 to establish a workable election deadline.

There are several considerations the FCC must factor into its implementation time line. First, adequate time is needed for retransmission consent negotiations. Such negotiations can reasonably be expected to extend for several months in many instances. Even in the relatively few cases where a cable system and broadcast station have no disagreement on the terms

of retransmission consent, the need for drafting retransmission consent agreements and the internal and legal review of these agreements will take at least several weeks. In most cases, however, the time will be longer due to the fact that protracted negotiation may be necessary to resolve such issues as channel positioning, carriage of program-related VBI material, compensation and cross promotion. Where negotiations are ultimately unsuccessful, the cable system will need time to find alternate programming and realign channels.

The FCC's implementation schedule must also be cognizant of the need for signal carriage decisions to be implemented, where possible, prior to the beginning of the July 1st semi-annual copyright accounting period. As the NPRM correctly notes, the Copyright Office has consistently interpreted the Copyright Act to require full payment for any broadcast signal which is carried for any part of an accounting period.[68] To the extent that a cable operator is required to pay full copyright fees on a distant broadcast signal that it must drop for lack of retransmission consent, and then pay additional copyright fees for substitute programming, the cable operator is forced to incur unnecessary copyright fees with no real net gain in service to subscribers. Such costs will place upward pressure on basic cable rates, contrary to the intent of the 1992 Cable Act.

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[68] NPRM at ¶50.

The Commission's implementation timetable must also take into account the time needed to reconfigure the basic tier to accommodate changes in broadcast station carriage. For example, cable operators which presently offer a twelve channel basic tier and secure that tier by trapping out all channels above channel 13 may need to expand the number of channels offered to subscribers as part of the basic tier to comply with the new requirements of the statute. In such instances, operators will have to replace existing traps to allow basic subscribers to receive the additional channels. The FCC's implementation procedures must give operators enough time to identify exactly the type of equipment needed and then to order, receive and install the equipment prior to the October 6, 1993 deadline.[69] In geographically large systems, the mere installation of equipment once it is on hand can take several months.

Furthermore, because in many instances subscribers will be losing access to broadcast stations which have been carried on systems for many years, the implementation period must allow sufficient time for cable operators to educate and prepare subscribers for the adjustment. Indeed, the mechanics involved just to produce new marketing materials and program guides that

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[69]There is the very real possibility that the widespread service reconfiguration that will occur to meet statutory requirements will result in equipment backorders and delays similar to those experienced in 1984 when the Commission required cable systems to begin offsetting frequencies in the aeronautical communications and navigation bands.

reflect new channel lineups can take two months or more. Finally, many cable operators have franchise requirements that require thirty to sixty days advance notice prior to the implementation of any programming changes. Such requirements are expressly sanctioned by the new legislation and thus cannot be ignored.[70]

Based on all of the foregoing considerations, the FCC should require local commercial stations to elect between retransmission consent and must-carry and notify each cable system via written notice of their election by May 1, 1993 and by May 1st every three years thereafter.[71] It is a simple matter for broadcast stations to determine which ADI they are located in, which counties are located in that ADI, and which cable systems operate in those counties.[72] ADI information is readily available from such publications as Broadcasting and Cable Marketplace. Similarly, the Cable and Services Volume of the Television and Cable Factbook contains a listing of cable systems by county within each state. Given the ready availability of the information required by broadcasters to

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[70]See Pub.L. No. 102-385, 106 Stat. 1460, at §16(c) (1992), to be codified, in part, at 47 U.S.C. §544(h)(1).

[71]This would give broadcasters a full thirty days from the FCC's April 1st target date to make their election and notify individual cable systems. This is more than enough time given the fact that broadcasters have had since the October 5, 1992 enactment date of the statute to contemplate their election and identify the cable systems located in their ADIs to whom notice of the election must be sent.

[72]Note the discussion in footnote 32, supra, regarding the election by cable systems located in more than one ADI.

meet the must-carry/retransmission consent notification requirement, it will be far easier for broadcasters to make and notify cable systems of their must-carry and retransmission within thirty days than it will be for cable operators to actually implement the results of those decisions within the five months remaining between May 1st and October 6th.

As suggested in the NPRM, the Commission's implementation procedures should specify a default election procedure in the absence of an affirmative must-carry/retransmission by local stations.[73] Thus, any local station, whether it was being carried by a system or not, would be deemed to have granted retransmission consent in the absence of an affirmative written election by May 1. Such stations would be precluded from asserting must-carry or compensatory retransmission consent rights until the next three year window. By adopting a default election procedure which maintains the status quo, the Commission would prevent unnecessary disruption of established viewing patterns and the associated costs that such disruptions would entail without in any way limiting a station's right to elect between must-carry and retransmission consent. Such a procedure ensures that a station wishing to change its existing election remains free to do so as long as such election is accomplished by the May 1st deadline.

As a final matter, the Commission has sought comment on its interpretation that Section 614(b)(9) of the 1992 Cable Act

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[73]NPRM at ¶51.

requires cable operators to provide thirty days advance written notice before deleting any local commercial station in the initial period after the must-carry rules become effective and before the retransmission consent provisions take effect.[74] The Commission's tentative conclusion to apply the notice requirement to all local commercial stations is overly broad. For example, the Commission itself acknowledges that the notification provisions of Section 614(b)(9) do not apply to stations which elect retransmission consent.[75] Thus, where a station has elected retransmission consent, a cable operator should not be required to provide notice of deletion of that station absent a provision in the retransmission consent agreement requiring such notice. On the other hand, where a cable operator deletes a station prior to the election deadline imposed by the Commission and the station has not yet made an election or has elected must-carry rights, the thirty-day notice requirement is reasonable and should apply.

D. Relationship Between Must-Carry and Retransmission Consent.

The Commission has requested comment on its tentative conclusion that cable operators may count channels used for the carriage of local television stations granting retransmission consent stations to meet the channel quota requirements of

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[74] Id. at ¶49.

[75] Id. at ¶55.

Section 614.[76] The legislative history of the retransmission consent provisions in the 1992 Cable Act supports the Commission's conclusion that Congress intended channels used to carry local retransmission consent stations be counted towards the maximum number of channels which cable operators are required to devote to the carriage of local television signals. The Senate Report states unequivocally that:

> [T]he FCC's rules should provide that carriage of a station exercising its right of retransmission consent will count towards the number of local broadcast stations that a cable system is required to carry under sections 614 and 615.[77]

Similarly, the sectional analysis of Section 6 of the 1992 Cable Act contained in the Senate Report states:

> [T]he election of certain stations to negotiate with cable systems for retransmission consent will not have any effect on the rights of other stations to signal carriage under sections 614 or 615. However, the Committee intends that stations which exercise their retransmission consent rights and are carried by cable systems will be counted toward the total number of stations required to be carried under sections 614 and 615.[78]

Clearly, Congress recognized that a station, which otherwise meets the definition of a local station to which the must-carry cap provision applies, does not become any less local merely by electing to negotiate retransmission rights in lieu of asserting must-carry.

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[76] Id. at ¶54.

[77] Senate Report at 37-38.

[78] Id. at 84.

The Commission has requested comment concerning the proper criteria to be used to determine when a local retransmission consent station, which is afforded less than full time carriage, should count against the must-carry cap.[79] The Commission has correctly noted that retransmission consent stations may negotiate for partial carriage of their programming schedule.[80] To the extent that a station may be limited or precluded from granting retransmission consent due to the provisions of its contracts with a network or program suppliers, there may be many instances where a particular station would be able to grant retransmission consent for only part of its broadcasting day. In such instances, a cable operator who carries such programming would still have to make available channel capacity for that purpose regardless of the actual number of hours such programming is carried. Therefore, the Commission should count any channel capacity which a cable operator regularly uses for the carriage of local signals regardless of whether or not such channels are used on a full time basis for such purposes.

The Commission requests comment on its tentative conclusion that the manner of carriage and channel positioning requirements which are granted to must-carry stations do not apply to retransmission consent signals.[81] As noted by the

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[79]NPRM at ¶61.

[80]Id. at ¶¶60-61.

[81]Id. at ¶¶55-56.

Commission, the statutory language is not uniform with respect to the channel positioning and manner of carriage requirements. However, the clear language of Section 325(b)(4) leaves no doubt that these provisions do not apply to retransmission consent stations. That section provides:

> If an originating television station elects under paragraph (3)(B) to exercise its right to grant retransmission consent under this subsection with respect to a cable system, the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system.[82]

Since manner of carriage and channel positioning requirements are contained in Section 614, it is evident that Congress did not intend for such privileges to apply to stations electing retransmission consent.

There is no need or sound policy reason to grant channel position and manner of carriage rights to stations electing retransmission consent since such issues can always be negotiated between the cable operator and the station as part of the retransmission consent agreements. If the Commission were to allow stations to elect retransmission consent and also impose channel positioning rights and manner of carriage requirements on cable operators, this would seriously undercut the ability of cable operators to negotiate retransmission consent agreements that reflect a marketplace determined value of cable carriage and would most certainly result in higher

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[82]Section 325(b)(4).

retransmission consent costs, exerting an upward pressure on basic cable rates.

E. **Contractual Issues.**

Section 325(b)(6) of the Act provides as follows:

> Nothing in this section shall be construed as modifying the compulsory copyright license established in Section 111 of Title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers.

The Commission questions whether, under this section, broadcasters have the ability to negotiate for retransmission consent with cable operators as to programming where the contracts between the broadcast station and program supplier expressly prohibit or restrict retransmission.[83] The Commission suggests that the language quoted above permits existing or future contractual agreements between broadcasters and program suppliers to deal with retransmission rights.[84] It seeks comments on this interpretation, and on the ability of broadcasters to grant or withhold retransmission consent where their programming contracts are silent on the issue.[85] Time Warner supports the Commission's interpretation of the statute on both issues, although it suggests providing for a grace period to amend programming contracts which do not deal with

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[83] NPRM at ¶65.

[84] Id.

[85] Id.

retransmission consent, an approach similar to that used in the reimposition of the syndicated exclusivity rules.[86]

It is indisputable that Congress intended to grant broadcasters control over the retransmission of their signals. In granting these rights to broadcasters, it is equally clear that the provision was not intended to limit the rights of program suppliers to control the use of their product. The seeming tension between the two clauses in Section 325(b)(6) is easily reconcilable. Congress intended that the compulsory license scheme should remain unmodified. Thus a cable operator cannot claim that retransmission consent by a broadcast station includes the rights to the underlying programming. A cable operator who receives retransmission consent from a broadcast station must still fulfill the requirements of Section 111 of Title 17, namely, the applicable statutory license fee must be paid for the carriage of that signal. Conversely, the ability to grant retransmission consent can be governed by present and future contractual agreements between broadcast stations and program suppliers. Congress was exceedingly careful not to intrude upon the contractual relationship between broadcast stations and program suppliers.

The rights of program suppliers in the retransmission consent context is not unlike the situation which the Commission dealt with in the reimposition of its cable

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[86]Report and Order in Gen. Docket No. 87-24, 3 FCC Rcd 5299 (1988).

television syndicated exclusivity rules.[87] In the syndicated exclusivity context, the Commission found that programmers negotiate for the sale of their programming on a market by market basis. One of the factors entering into the negotiation is whether the broadcaster licensing the program chooses to purchase certain exclusive rights to that program. Prior to the reimposition of the syndicated exclusivity rules, the only enforceable exclusivity rights which the broadcaster could buy were as against other local broadcasters and against the importation of the same programming on originating cable networks. It was impossible to enforce exclusivity against the importation of distant broadcast signals by cable systems since there were no limits on such importation. The Commission held that such a situation often devalued the programming in the local broadcaster's eyes and thus lowered the economic value of the programming for both parties to the negotiations. The Commission therefore reimposed syndicated exclusivity rules in order to give the broadcast station and the program supplier more freedom to negotiate. As the Commission concluded:

> . . . in considering the competitive relationship between broadcast and non-broadcast media, we believe that the public interest is enhanced by promoting a framework that interferes as little as possible with market incentives to meet viewer preferences.[88]

A broadcast station can now purchase exclusivity against cable importation from a program supplier and that right can be

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[87] Id.

[88] Id. at ¶51.

invoked against a cable operator's importation of a program which the broadcast station has under exclusive contract. Of importance in the present context is the fact that the broadcaster may not wish to purchase exclusive rights to the program or, conversely, that the program supplier may not wish to sell those rights to the broadcaster. Indeed, the two parties may not be able to agree on a price for exclusivity. If there is no syndicated exclusivity right in the program contract, the broadcaster has no right under the Commission's rules to request a blackout from a cable system which is importing a program which the broadcaster is transmitting on its station.

The analogy to the retransmission consent is crystal clear. Congress has awarded broadcasters the right to grant retransmission consent. However, the bulk of the programming carried on a broadcast station is obtained from program suppliers via contract. If the ability to consent to the retransmission of that programming is not obtained, indeed if a clause in the contract precludes the broadcaster from granting retransmission consent, then to rule that such contractual provisions are negated by the retransmission consent provisions of the Act would run contrary to the clause in Section 325(b) which provides that that section is not meant to affect existing or future licensing agreements between broadcast stations and program suppliers.

The logic of permitting broadcasters to grant retransmission consent no matter what their contracts with the program suppliers provide would affect licensing agreements with program suppliers, in particular the suppliers of syndicated programming. Program suppliers offer their product from market to market. The extent of the rights granted by contract are items of hard and significant bargaining. Those rights include the length of the contract, the number of showings of the program, the extent of territorial exclusivity to the broadcast station, and the exclusivity of the rights granted to the broadcast station. If the broadcast station having such a program under contract could freely grant retransmission consent, either locally or to be carried as a distant signal, it is obvious that this action would have a devastating effect on the licensing agreement which the broadcast station had entered into with the program supplier. Putting it another way, the reading of the retransmission consent provision to permit a broadcast station to so act would alter the right of a program producer to control the use of its product. Such an alteration is obviously contrary to Congress' intent in enacting the retransmission consent provision.

In short, any theoretical reading of the new cable retransmission consent provision which separates the broadcaster's signal from the programming contained on that signal would undermine the intent of Congress. A reading which would give broadcasters a free hand in granting or denying

retransmission consent clearly would "abrogate or alter existing program licensing agreements between broadcasters and programming suppliers, [and would] limit the terms of existing or future licensing agreements."[89]

The Commission also asks whether it should read the new retransmission consent provision as giving the power to broadcast stations to grant or withhold retransmission consent without specific authorization from the program suppliers.[90] Time Warner suggests that the Commission adopt an approach similar to that which it used when syndicated exclusivity rules were reimposed. Thus, Section 76.159 of the Commission's rules provides that contracts entered into after a particular date must contain specific language which permits a broadcast station to invoke syndicated exclusivity protection. However, if the contract was entered into prior to that date, it either had to contain a clear and specific reference to the broadcast station's authority to exercise exclusivity rights; it had to be amended to include the specific language dictated by the Commission; or a written acknowledgement had to be obtained from the program supplier that the contract should be read to include such rights.[91] Adoption of such an approach for retransmission consent would put parties on notice that future

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[89]Senate Report at 36.

[90]NPRM at ¶65.

[91]See 47 C.F.R. §76.159.

agreements must address this issue. As to existing contracts which did not deal with retransmission consent, the parties would have the opportunity to amend the contracts to so provide. If the contracts contained some provisions regarding retransmission consent and the language was not clear, the parties would have sufficient time in which to amend or clarify the meaning of the contract.

F. **Reasonableness of Rates.**

The Commission correctly notes that Section 325(b)(3)(A) requires the Commission to consider the impact of retransmission consent on rates for basic service to ensure that such rates are reasonable.[92] Although the Commission has indicated that it plans to leave this issue for its rate proceeding,[93] several points deserve mention here. The Commission is correct that retransmission consent fees are a direct cost of providing basic service, and thus cable operators must be allowed to recoup these costs.

To the extent that the Commission allows stations in their sole discretion to choose to refrain from granting retransmission consent, the Commission can and should prevent the public from being deprived of programming that would result if such stations were allowed to require network non-duplication and syndicated exclusivity blackouts. One of the Commission's main justifications for reimposing syndicated

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[92] NPRM at ¶66.

[93] Id. at ¶69.

exclusivity and expanding network non-duplication protection was to redress the perceived market imbalance resulting from the loss of must-carry rights by broadcasters. The Commission gave syndicated exclusivity and expanded network non-duplication rights to broadcasters as leverage to assist them in obtaining cable carriage which they could no longer demand as a matter of right.[94] However, this rationale no longer holds true given the fact that the 1992 Cable Act gives broadcasting stations far broader must-carry rights than they have enjoyed under previous versions of the Commission's rules and, in addition, unprecedented control over the use of their signals via the retransmission consent provisions. In a situation where a broadcast station does not wish to be carried or seeks to exact an unreasonably high price for cable carriage, there is no public policy to be served by allowing that station to deprive cable viewers of syndicated or network programming received from other stations which have either invoked must-carry or granted retransmission consent. Indeed, as Time Warner explained in the preceding section, a distant (non must-carry) station will be precluded from granting retransmission consent unless it has the contractual rights to do so. But if it <u>does</u> grant retransmission consent, this means

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[94]Indeed, this is exactly why, unlike its original syndicated exclusivity and network non-duplication rules which were in effect when must-carry was in place and only applied to stations actually carried on a cable system, the new syndicated exclusivity rules allow stations which are not being carried on the cable system to assert blackout rights. <u>See Report and Order</u> in Gen. Docket No. 87-24, 3 FCC Rcd 5299 (1988).

that no other station could have superior rights to that programming, and thus network nonduplication and syndicated exclusivity should be inapplicable.

CONCLUSION

Time Warner urges the Commission to pay close heed to the details in implementing the 1992 Cable Act so as to carry out the intent of Congress and to minimize the burden on cable operators and the impact on their subscribers.

Respectfully submitted,

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